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Supreme Court of the United States

October Term, 1963

No. 1187

GEORGE ALBERT RUTHERFORD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

There was an opinion by the United States Court of Appeals for the Second Circuit, Appendix A.

Statement of Grounds of Jurisdiction

1. The judgment of affirmance of the United States Court of Appeals for the Second Circuit was entered May 27, 1964.

2. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. Section 1254.

Constitutional Amendments Involved

1. First Amendment—United States Constitution
2. Fifth Amendment—United States Constitution
3. Sixth Amendment—United States Constitution

Statutes Involved

Title 18, U. S. C. Sec. 32:

"Destruction of Aircraft or Aircraft Facilities

Whoever willfully sets fire to, damages, destroys, disables or wrecks any civil aircraft, used, operated or employed in interstate, overseas, or foreign air commerce; or

Whoever willfully sets fire to, damages, destroys, disables or wrecks any aircraft engine, propeller, appliance, or spare part with intent to damage, destroy, disable or wreck any such aircraft; or

Whoever, with like intent, willfully places or causes to be placed any destructive substance in, upon or in proximity to any such aircraft, or any aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material used or intended to be used in connection with the operation of any such aircraft, or any cargo carried on any such aircraft, or otherwise makes or causes to be made any such aircraft, aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material unworkable or unusable or hazardous to work or use; or

Whoever, with like intent, willfully sets fire to, damages, destroys, disables, or wrecks, or places or causes to be placed any destructive substance in, upon or in proximity to any shop, supply structure, station, depot, terminal, hangar, ramp, landing area, air navigation facility or other facility, warehouse, property, machine, or apparatus used or intended to be used in connection with the operation, loading or unloading of any such aircraft or making any such aircraft ready for flight, or otherwise makes or causes to be made any such shop, supply structure, station, depot, terminal, hangar, ramp, landing area, air navigation facility, or other facility, warehouse, property, machine, or apparatus unworkable or unusable or hazardous to work or use; or

Whoever, with like intent, wilfully incapacitates any member of the crew of any such aircraft; or

Whoever willfully attempts to do any of the aforesaid acts or things—

shall be fined not more than $10,000. or imprisoned not more than twenty years or both."

18 U. S. C. Sec. 35 (Amended in 1961);

"Imparting or Conveying False Information

(a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this Title shall be fined not more than $1,000. or imprisoned not more than one year or both.

(b) Whoever willfully and maliciously or with reckless disregard for the safety of human life, imparts or conveys or caused to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this Title—shall be fined not more than $5,000. or imprisoned not more than five years, or both."

Indictment

Petitioner was indicted for a violation of 18 U. S. C. Section 35(a). It charged that the petitioner imparted and conveyed the false information that he then and there had a bomb "which information concerned an attempt to do an act which would be a crime prohibited by Title 18 U. S. C. Sec. 32, and which information the defendant knew to be false."

Questions Presented for Review

1. Whether the Statute, Section 35(a), as amended in 1961, and as applied to the facts in this case, abridged appellant's right of free speech guaranteed by the First Amendment?

2. Whether Section 35(a) as amended in 1961, is unconstitutionally vague?

3. Whether the indictment is not fatally defective because it charges conveying false information about possessing a bomb—but omits essential allegation as to intent to damage, destroy the plane,—required to constitute a crime under 18 U. S. C. Sec. 32?

4. Whether the evidence is insufficient as a matter of law to sustain the conviction?

Statement of Case

Petitioner, a deck officer for many years in the Merchant Marine of the United States, was a passenger on board airplane which had not yet taken off at Idlewild Airport, on August 13, 1962.

1. *Petitioner incorporates in this petition the argument, analysis and authorities contained on pages 4 to 11 in the similar petition for certiorari of John Humphrey Sullivan* v. *U. S., No. 1401 Misc., now pending in this Court.*

The same statutes and the same indictment raise identical questions of the validity of the amended Sec. 35(a), and also the adequacy of the indictment which charged false information as to possession of bomb, but omitted essential allegation of intent to damage and destroy the plane so as to constitute a crime under 18 U. S. C. Sec. 32. Such omission renders both indictments defective.

2. *Dictum of Holmes about falsely shouting fire in a theatre does not support validity of Title 18, U. S. C. Sec. 35(a) as amended in 1961.*

To sustain the validity of this conviction, the trial judge relied in part and quoted the famous dictum of Holmes in *Schenck* v. *U. S.*, 249 U. S. 47, 52:

> "• • • • the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic."

Holmes himself, in his dissent in *Hyde* v. *U. S.* 225 U. S. 347, 391, warned of the danger of repeating phrases:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."

It is now time to apply the appropriate analysis to the fire-in-theatre phrase. *That illustration is not a sample of free speech.* It is the negation, the stoppage of all speech. Free speech implies time for questions, for answers, for inquiry and the weighing of the evidence. That is the reality of free speech, that is Government by discussion as protected by the First Amendment.

The shouting fire-panic-in-theatre is not free speech at all. It is an explosive, deadly action. It is immaterial that it consists of one shouted word only. Its character of havoc producer is revealed by its consequences. It obliterates all thought, all speech, all appeal to reason, all possibility of balancing the evidence. It creates instantaneous pandemonium. An uncontrollable flood of human beings, rendered mad by terror, swirls, surges, tramples and destroys. Action with such frightful, concentrated power whose results are immediate and beyond human regulation, is not protected by the Constitution.

Now consider the completely different situation in the instant case. There is no shouting, there is no crowded theatre (while Holmes did not use the word "crowded", that is clearly implied, and is so construed in *Thomas* v. *Collins*, 323 U. S. 516, 536), and there is no panic. *The plane has not yet taken off.* It is still on the ground. The passenger quietly tells the stewardess that "me and my bomb are going to sit here", or words to that effect in answer to her question (15a). She reports to the Captain and the Captain promptly comes back and investigates, and is told the simple explanation, and shown the sextant in the box. Except for a few minutes delay in the takeoff, nothing happens (7a; 15a; 16a).

3. *As this is a unique, exceptional case, the evidence creates a reasonable doubt as a matter of law.*

a) *While petitioner used the word "bomb", he testified that he used it to describe the sextant which he carried in box and used on his ship.*

The petitioner, 44 years old, married and with no prior criminal record, is a deck officer in the Merchant Marine of the United States. He possessed and used this particular sextant for about eight years. And during the course of his service at sea, he applied a nickname to the sextant. He called it a "bomb", and so did other navigators and seamen (15a). He explained the nickname and usage to the Captain of airplane on day of the incident, and also to the F.B.I. agent who interrogated him (16a). Neither testified to contradict his testimony.

One Government witness, Captain Stanley Ohlin, had been in Navy over eighteen years. And prior to that, he had been in the Merchant Marine. He had never heard a sextant referred to as a bomb in either service. But he had heard the sextant called a very revealing nickname. It was called a "hambone" (20a). And then a trifle, but a tremendous trifle, occurred in court. The Assistant Dis-

trict Attorney did not understand the term. The witness repeated it by emphasizing and dividing the word into two parts—*"Ham Bone"*. The very difficulty of the Assistant District Attorney in understanding the nickname—"Ham Bone"—suggests the inevitable evolution. Possibly, after Captain Ohlin left the Merchant Marine about 25 years ago, other seamen had the same trouble with this oddish and too long a nickname. Some practical sailor cut the Gordian Knot, and it became the shorter and more easily pronouncable "bomb". In conclusion, Captain Ohlin's own testimony, in part, strongly supports the petitioner's version.

b) *Was there any conversation about tail blowing off, and that petitioner did not care, he had plenty of insurance?*

The stewardess was the only witness, out of seven employees on the plane, who claimed she heard somebody say something "about a tail blowing off". And afterwards, she remembered that the petitioner said "he didn't care, he had plenty of insurance". *But not a word as to how the conversation started, who started it, or its context was given by the witness.* Clearly, such testimony—without specific beginning and connection, was inadmissible, misleading and prejudicial.

The defendant positively denied any conversation about the tail blowing off, and that he did not care because he had plenty of insurance (16a).

It is significant that the only testimony on behalf of the prosecution as to the words used by the petitioner, was that of the 23 year old stewardess. The very absence of all other possible witnesses,—Captain, co-pilot and four other stewardesses, the F.B.I. agent to whom the petitioner told his story, and other passengers—is strong proof that the petitioner's explanation was substantially true.

c) *This, we repeat, is a unique and exceptional case; the sextant in box of petitioner with the other evidence,*

constitutes an exceptional case and creates a reasonable doubt as a matter of law.

If the petitioner had been an ordinary passenger, and had never been to sea, it might be argued that his explanation created an ordinary conflict. But the very presence of the sextant in his box, his record in the Merchant Marine, and above all, the partial corroboration by the Government's sole witness, Captain Ohlin—when added together, constitute a unique, exceptional case. Clearly, this is not the average case where an ordinary conflict is settled by the trier of the facts. Here, the unusual facts produce an entirely different, indeed, an extraordinary situation. Under such unique circumstances, it is the appellate function of review that becomes paramount. Of what meaning are the ancient and still valid principles of Presumption of Innocence and Reasonable Doubt if they do not tilt the scales in petitioner's favor as a matter of law?

Of course, it is impossible to compare the peculiar facts in various cases. However, the total absence of any criminal intent, any criminal conduct—a scientific instrument is referred to by its vernacular trade name and a defendant is convicted—brings us within the ruling of *Rent* v. *U. S.*, 209 F (2) 893 involving the possession of marijuana. In reversing, the Court wrote, page 900:

> "There was no substantial evidence against the defendant of a criminal intent. The evidence was consistent with innocence. It is too much for a man to be imprisoned for two years for merely picking up and throwing away a cigarette."

Instead of a cigarette, the petitioner picked up and used a word, a trade nickname for a scientific instrument. Insufficiency of evidence cannot be more graphically portrayed. It comes within Harlan's concurring opinion in *Petersen* v. *Greenville*, 373 U. S. 244, 265:

> "A conviction so lacking in evidence to support the offense must fall under the 14th Amendment."

And practically, it parellels the "totally devoid of evidence" condemned in *Thompson* v. *Louisville*, 362 U. S. 199.

4. *Analysis of opinion of Circuit Court of Appeals.*

a) In it, reference is made to the parts of Sec. 32 making the damaging, destroying a plane, or attempt to do so, a crime with no mention of intent. That is true. Implicit in such acts or attempts is the intent. Different, however, is possession of a bomb or destructive substance. Such possession may be innocent or equivocal. Therefore, Sec. 32 expressly provides that possession becomes a crime *only when there is the intent to damage and destroy the plane.* And, consequently, a charge of false information about possession must include the intent definitely set forth in Sec. 32.

b) The Circuit Court relies on the classic dictum of Holmes about shouting fire in theatre, *Schenck* v. *U. S.*, 249 U. S. 47, 52. The error stems from failure to recognize the pivotal difference between Sec. 35(a) and Sec. 35(b) as amended in 1961. In the later, Sec. 35(b), was placed the genuine criminal activity: "*Whoever willfully and maliciously or with reckless disregard for the safety of human life, imparts,*" etc. Since Section 35(b) prohibits bad, dangerous conduct, it might be sustainable on the analogy of the shouting fire-in-theatre dictum.

On the other hand, tested by the same analogy, Sec. 35(a) is invalid. When an act is not willful, not malicious, not in reckless disregard for the safety of human life, it is not criminal. It is inadvertent, accidental, innocuous and innocent activity. It is not blameworthy. And as Holmes wrote, although with some waverings:

> "criminal liability * * * is founded on blameworthiness" The Common Law, p. 50.

c) The conventional phrase of the Circuit Court, that the findings are based on "conflicting but sufficient evi-

dence", reveals a lack of appreciation of the unique and exceptional character of the instant case. As we have pointed out, if this were the case of an ordinary passenger who had never served at sea, the finding by the trial judge as to the petitioner's explanation would be final. Not so in a unique and exceptional case. Once the sextant was found in the box of petitioner, plus his U. S. Merchant Marine service, and his testimony as to the nickname, and especially because of the partial corroboration by the government witness, Captain Ohlin, the character of the case changed. It was no longer an ordinary conflict, settled by the trier of the facts. It became a unique, exceptional case, and by its extraordinary nature, creates a reasonable doubt as a matter of law.

d) "An information in this form was upheld by this Court in *U. S.* v. *Allen*, 2nd Circuit, 317 F (2) 777." That is incorrect. It overlooks the undisputed fact that the supplemental information, at issue in Allen, was not similar to the Rutherford indictment. Allen differed in one vital item: *It set forth that an attempt was being made to damage and destroy the plane.* Consequently, the supplemental information in Allen was both different and valid. Therefore, the Allen comment as to intent was dictum, and, we submit, erroneous dictum. The contrary ruling in Carlson, 9th Circuit, 296 F (2) 909, should be preferred.

The Circuit Court has misunderstood the petitioner's position as to the inadequacy of the indictment. The amendment of Section 35(a) in 1961, has an important bearing only on the validity of that section. It has none whatever on the adequacy of the indictment. Both before and after the amendment, if the indictment omits an essential of the crime, it is inadequate.

Besides, there was no amendment of Section 32. Its provision that possession of a bomb or destructive substance constitutes a crime *only with intent to damage and destroy plane*, remains unaltered.

Reasons for Granting Writ

(The first three are similar to those in *Sullivan* v. *U. S.* Petition for Certiorari, No. 1401 Misc.)

1. Conflict in decisions between 9th Circuit, in *Carlson* v. *U. S.*, 296 F. (2) 909, and the 2nd Circuit, in *U. S.* v. *Allen*, 317 F. (2) 777, now followed by two other cases in 2nd Circuit, *Sullivan* v. *U. S.* (No. 1401 Misc. in U. S. Supreme Court), and *Rutherford* v. *U. S.* (the present petition) should be resolved.

2. The *Carlson* decision that intent element should be set forth in the indictment—when false possession of bomb is charged—is the correct ruling. It keeps the issues in focus, and promotes the fair administration of justice. It should be adopted.

3. Since Title 18 U. S. C. Sec. 35(a) applies to air traffic in interstate commerce all over the United States, and since this traffic is constantly increasing, public policy requires that the issue of the validity or invalidity of this Sec. 35(a) and the inadequacy of the indictment be decided promptly. In such a situation, "the passive virtues", over-extolled by Prof. Alexander M. Bickel in "The Least Dangerous Branch", pp. 113-198, and sometimes justifiably practiced, should not be followed in the instant case.

4. In addition to the three reasons above—identical to those in *Sullivan* v. *U. S.*, No. 1401 Misc.—there is a fourth reason: ordinary conflicts can be settled by the trier of facts, whether judge or jury. A different principle must be applied when the situation is unique, exceptional and extraordinary. In such a setup, a reasonable doubt is created as a matter of law. If this principle is adopted in unique cases, the administration of justice will be promoted, fair trials better secured, and due process of law strengthened. Particularly should this be done when there is involved a new statute, never before interpreted by the United States Supreme Court.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 330—September Term, 1963.

(Argued March 6, 1964 Decided May 27, 1964.)

Docket No. 28584

UNITED STATES OF AMERICA,

Appellee,

against

GEORGE ALBERT RUTHERFORD,

Defendant-Appellant.

Before:

WATERMAN and KAUFMAN, *Circuit Judges* and DIMOCK, *District Judge.*

Appeal by defendant from a judgment of conviction in the United States District Court for the Eastern District of New York. Jacob Mishler, *District Judge.*

Affirmed.

FRANK SERRI, Brooklyn, New York, for *Appellant.*

JEROME C. DITORE, Assistant United States Attorney for the Eastern District of New York (Joseph P. Hoey, United States Attorney for the Eastern District of New York), *for Appellee.*

DIMOCK, *District Judge*:

This is an appeal from a judgment of conviction under section 35(a) of title 18 of the United States Code, the first part of the so-called "bomb hoax" or "false tip" section. A one-count indictment charged that appellant, while on board a United States airplane at the New York International Airport, "imparted and conveyed the false information that he then and there had a bomb, which information concerned an attempt to do an act which would be a crime prohibited by Title 18, U. S. C. Section 32, and which information the defendant knew to be false." Appellant testified that he had used the word "bomb" as a colloquial expression for a marine sextant that he was carrying in a case.

Appellant was sentenced to serve ten days with service of the remainder of a one year sentence suspended.

On a trial without a jury before District Judge Mishler, the court, on conflicting but sufficient evidence, made the following findings:

> "2) While walking near the rear of the said plane defendant said to Ruth Raolo [the airline stewardess], or within her hearing, 'I have to sit near the back because I have a bomb.'"
>
> "3) After someone (unidentified) made a statement containing the phrase or expressed the thought of the 'tail blowing off,' defendant stated that he didn't care since he had plenty of insurance."
>
> "5) The navigational sextant is not commonly referred to by seamen or anyone else as a 'bomb.'"
>
> "6) The reference in finding No. 3, concerning insurance, was knowingly and intentionally made to impart and convey the false information that the destructive force of the bomb would destroy the plane and end his life."

"7) Defendant knowingly and intentionally imparted the false information that he was carrying a destructive and explosive substance referring to the wooden case holding the navigational sextant."

Appellant's contention that the evidence was insufficient to sustain a conviction is without substance.

It is contended that the statute abridges freedom of speech in violation of the First Amendment.

Both section 32 and an earlier form of section 35(a) were parts of Public Law 709 adopted July 14, 1956, entitled "An act to punish the willful damaging or destroying of aircraft or motor vehicles, and their facilities, and for other purposes." In amended form it constitutes Chapter 2 of Title 18 of the United States Code. Sections 32 and 35(a) are quoted in the margin.*

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* § 32. Destruction of aircraft or aircraft facilities

"Whoever willfully sets fire to, damages, destroys, disables, or wrecks any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; or

"Whoever willfully sets fire to, damages, destroys, disables, or wrecks any aircraft engine, propeller, appliance, or spare part with intent to damage, destroy, disable, or wreck any such aircraft; or

"Whoever, with like intent, willfully places or causes to be placed any destructive substance in, upon, or in proximity to any such aircraft, or any aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material used or intended to be used in connection with the operation of any such aircraft, or any cargo carried or intended to be carried on any such aircraft, or otherwise makes or causes to be made any such aircraft, aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material unworkable or unusable or hazardous to work or use; or

"Whoever, with like intent, willfully sets fire to, damages, destroys, disables, or wrecks, or places or causes to be placed any destructive substance in, upon, or in proximity to any shop, supply, structure, station, depot, terminal, hangar, ramp, landing area, air-navigation facility or other facility, warehouse, property, machine, or apparatus used or intended to be used in connection with the operation, loading, or unloading of any such aircraft or making any such aircraft ready

Section 32 deals with damaging or destroying aircraft, damaging or destroying aircraft parts with intent to damage or destroy the aircraft, placing destructive substances on aircraft or parts with like intent, and damaging or placing destructive substances on aircraft facilities with like intent. Section 33 deals similarly with motor vehicles except that no act is made criminal unless done with intent to endanger, or with reckless regard for, human life.

Section 35(a), under consideration in this case, makes criminal the imparting of information, knowing the information to be false, concerning an attempt or an alleged attempt being made or to be made to do any act which would be a crime prohibited by the chapter. Thus the statute would be violated by the imparting of knowingly false information with respect to an attempt about to be made to damage an aircraft, in any way irrespective of

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for flight, or otherwise makes or causes to be made any such shop, supply, structure, station, depot, terminal, hangar, ramp, landing area, air-navigation facility or other facility, warehouse, property, machine, or apparatus unworkable or unusable or hazardous to work or use; or

"Whoever, with like intent, willfully incapacitates any member of the crew of any such aircraft; or

"Whoever willfully attempts to do any of the aforesaid acts or things—

"shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

§ 35. Imparting or conveying false information

(a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

(b) Whoever willfully and maliciously, or with reckless disrgard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than $5,000, or imprisoned not more than five years, or both.

the saboteur's intent, or to damage a motor vehicle in any way, with intent to endanger the safety of any person on board.

If the statute so far as it applied to aircraft were limited to making criminal the imparting of false information with respect to the existence of a bomb on a loaded aircraft, there could be little doubt that the giving of the false information would be beyond the protection of the First Amendment. It would fall within the principle of the false cry of fire in a crowded theatre, the classic illustration of unprotected speech given by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52. Such speech is characterized as a "verbal act" by Mr. Justice Lamar in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439, cited in the *Schenck* opinion.

As above indicated, however, the statute goes much farther and, on its face, would make criminal the imparting of information known to be false that someone was about to destroy the motion picture screen on an out-of-service aircraft undergoing repairs in its hanger. Nevertheless we need not consider the question whether a provision of a statute denouncing that act in those terms would offend the First Amendment. As applied to the act of which appellant was found guilty, the act is clearly constitutional. The decision of the question whether the act is unconstitutional as applied to some other set of circumstances must be left for a case which raises that question. *United States* v. *Raines*, 362 U. S. 17.

Appellant's contention that the statute is unconstitutionally vague in that its words permit conviction for innocent acts is answered in the same way. There is nothing vague about its application to the facts found by the court below.

Finally, we are told that the indictment is defective as it omits an essential element of the crime. It will be remembered that section 35(a) makes criminal the imparting of false information concerning an attempt "to do any act which would be a crime prohibited by this chapter."

The indictment charges that the defendant, while on board an aircraft, "imparted and conveyed the false information that he then and there had a bomb, which information concerned an attempt to do an act which would be a crime prohibited by Title 18, U. S. C. section 32, and which information the defendant knew to be false." Section 32, therein referred to, is part of the same chapter as section 35(a) and penalizes, among others, whoever willfully places any destructive substance in an aircraft "with intent to damage, destroy, disable, or wreck any such aircraft."

The alleged defect in the indictment is that, while it stated that the imparted information concerned the placing of a destructive substance on an aircraft, it failed to state that it was a placing "with intent to damage, destroy, disable or wreck" the aircraft that the information concerned.

An information in this form was upheld by this court in *United States* v. *Allen*, 2 Cir., 317 F. 2d 777. Counsel seeks to distinguish that case on the ground that section old 35, which was there concerned, differed from the present section 35(a) in that section old 35 penalized whoever, "willfully" imparted the false information, while section 35(a), which is otherwise identical, omits that word.

We fail to understand why there is more need for alleging intent of the saboteur in a case where willfulness of the informer is no part of the crime than where the informer's willfulness is a necessary element. We hold that this court's decision in the *Allen* case is applicable here and we adhere to it.

The judgment of conviction is affirmed.